In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 19

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

REPLY BRIEF FOR THE APPELLANT AND THE UNITED STATES AS AMICUS CURIAE

The purpose of this reply brief is to correct an important inaccuracy in the Brief for the Appellees and to answer two contentions not dealt with in our principal brief.

1. Appellees state (Br. 5) that for the first three months of the contract term the fuel was delivered at a destination inside the State of Idaho, and only after that at Salt Lake City. Later (Br. 11-12), they assert that "[t]o begin with, delivery was admittedly made to a point in [Idaho]. That was

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changed by agreement. The change required nothing more than a change of the point of destination."

These assertions are inaccurate and highly misleading. The contract between the General Services Administration and the appellant called for the delivery of the fuel f.o.b. Salt Lake City (R. 95). An affidavit by an officer of the Utah Oil Company (appellant's predecessor) shows (R. 62–63), and the Supreme Court of Idaho found (R. 252–253, 255), that throughout the entire term of the contract—not merely during the last nine months—the fuel was delivered at Salt Lake City to carriers selected and paid by the AEC. At no time did the appellant designate the carrier or pay the transportation charges. At all times, title to the fuel, and with it the risk of loss or damage in transit, passed to the government at Salt Lake City, and appellant's contractual responsibility was as fully discharged as if the fuel had been picked up in Salt Lake City by the government's own tank trucks.

Appellees' erroneous statement that the gasoline was delivered at points in Idaho during the first three months of the contract was based solely upon a series of monthly reports submitted by the appellant to the State Tax Collector. For the three months in question, the reports listed various Idaho locations as the "Address" of the purchaser (R. 28–29, 31). Thereafter, the "Address" was uniformly given as Salt Lake City (R. 32–44). Apparently, the person who made out the report form at first construed it as asking for the place where the fuel was ultimately consumed, but later concluded that it was the point of delivery which

was called for. Significantly, the very same reports which list Idaho locations under the "Address" column state explicitly that the fuel was "sold and delivered to the Atomic Energy Commission, an agency of the United States, f.o.b. Salt Lake City * * *" (R. 27, 30). Plainly, the appellant's confusion in replying to an ambiguous question in a report form cannot alter either the terms of the contract or the facts of delivery, as established by uncontroverted affidavits and as found by both courts below.

2. Appellees' argument in this Court (Br. 8–13) is predicated upon a ground which they did not advance in the State court proceedings and which is not even mentioned in the decision of the Idaho Supreme Court. Briefly, the theory is that eleven items, including the two in issue here, were awarded to the appellant under the same bid invitation and therefore should be considered as a single contract; that most of the acts of appellant with respect to items other than the two in issue were performed inside Idaho; and that the transactions here were thus not "dissociated" from appellant's activities within the State of Idaho. That theory, we submit, is manifestly unsound.

There is no basis for the proposition that the eleven items awarded to the appellant were all part of a single contract. "Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all the promises as a single whole so that there would have been no bargain whatever, if any promise or set of promises were struck out'." (*United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 298). Here, the

acceptance of appellant's offer with respect to the two items in issue (63a and 64a) was in no way related to the bids or awards on other items. The invitation included 607 separate items, each designed to supply a discrete need of a particular government agency at one of a multitude of locations in a four-State area. Bids on each item were evaluated on their individual merits and accepted or rejected without reference to the other items,[1] so that awards could theoretically have been made to 607 different suppliers. The separateness and independence of items 63 and 64 are further indicated by the fact that appellant's bids on these items were not accepted at the same time as the others, but only two days later. These items were the only ones in which the AEC was the ordering agency; and the quantity of gasoline involved here (1,200,000 gallons) was of a completely different order of magnitude from that involved in any of the other transactions (the largest of which was only 3,000 gallons). Indeed, the AEC's requirements were more than 60 times greater than the volume called for by appellant's other nine contracts put together.[2] The mere fact that appellant had earlier been awarded other contracts to deliver small amounts of gasoline to other government agen-

[1] See, for example, "Terms and Conditions of the Invitation for Bids" (R. 166): "The Government may accept any item or group of items of any bid * * *."

[2] Items 4, 31, 43, 53, 76, and 81 each involved 2,000 gallons. Item 78 involved 2,500 gallons; item 82, 3,000 gallons; and item 486 (delivery in Washington), 900 gallons (R. 88, 91–93, 97–98, 149). The total volumes supplied under all of these items was 18,400 gallons, as compared to the 1,200,000 involved in the instant transaction.

cies at other sites in Idaho was, so far as this transaction is concerned, an entirely unrelated circumstance.

It would make no difference, moreover, even if all eleven items were deemed for some purpose to constitute a single contract. The basic objection to the tax—that it falls on activities which took place outside the State—would not be cured simply because the same contract happened to require performance of other activities which could properly be subjected to a State tax. The fact would remain that the activities which Idaho here seeks to tax were wholly "dissociated," both factually and legally, from the in-State activities which resulted in the sale and delivery of the other gasoline to other agencies elsewhere in Idaho.

3. Appellees argue (at p. 19) that while the United States was the nominal purchaser of the gasoline, Phillips Petroleum Company was the actual purchaser and ultimate user or consumer. That contention becomes relevant, of course, only if the incidence of the tax is upon the in-State user of the gasoline, rather than upon the dealer. In our main brief, however (pp. 27–29), we demonstrated that this is not the case. We there pointed out that, in the proceedings below, the parties agreed, the trial court explicitly held, and the Idaho Supreme Court strongly implied that the tax is precisely what it appears to be—a privilege tax upon the dealer. And despite implications to the contrary in their Motion to Dismiss, appellees now expressly agree with us that "this is a privilege tax, the incidence of which falls on the dealer" (Br. 5).

Accordingly, as the trial court concluded (R. 223), the status of Phillips Petroleum is "not * * * material to a decision of this case, because if it is not a 'use tax,' it becomes unimportant who was the actual purchaser."

Let us suppose, however, contrary to fact, that (a) the Idaho tax were a "use" tax and (b) that Phillips, by virtue of its management contract, were liable for that tax. It still would not follow that Idaho could validly appoint as its tax collector an out-of-State dealer which (i) was not itself subject to the tax; (ii) had no contractual relationship with Phillips and no means of obtaining reimbursement from it; and (iii) could "collect" the tax, if at all, only from the United States, which enjoys a constitutional immunity from the tax.

In an effort to overcome that obstacle, appellees argue that Phillips was not only the ultimate consumer of the fuel, but also the true purchaser, and the AEC merely acted as its "purchasing agent" in dealing with the appellant. That contention has no support in the record and, indeed, turns the relationship between the government and Phillips upside down. A responsible official of the AEC stated in his affidavit (R. 208), without contradiction, that the gasoline imported from Utah was placed in storage tanks owned by the United States; that the fuel was later consumed in government-owned vehicles used to transport government personnel to and from the AEC installation; that the fee charged for this transportation accrued to the sole benefit of the government and

was deposited in a government-owned bank account; and that the losses regularly incurred in this operation were borne by the government. Thus, while Phillips, pursuant to its management contract, was in charge of the operation of the vehicles, and in that sense may perhaps be looked upon as a "user" of the gasoline, the government most certainly did not purchase the fuel on Phillips' behalf. To be sure, the affidavit of appellees' attorney (R. 215–216) states that employees of Phillips testified in deposition in another case that it was they who actually ordered the fuel, selected the carriers, and paid the transportation charges. On the other hand, the affidavit of an AEC official (R. 59) states that these functions were performed by the AEC. Moreover, the contract for the sale of the fuel explicitly designates the AEC as the "ordering activity" (R. 95) and states (R. 58) that the ordering activity will "place its own orders, make payment thereon, issue tax exemption certificates when appropriate, and furnish Government bills of lading for shipments which are to be made at Government expense." In the face of this contractual provision, it is difficult to see how employees of Phillips could possibly have placed the orders or paid the freight charges, unless it be assumed that Phillips was acting on the government's behalf and as its agent. But be that as it may, there is not the slightest indication in the record that Phillips paid the purchase price of the fuel or agreed to reimburse the government for such payment; and that alone seems fatal to any contention that Phillips was the "purchaser" or in any way a party to the transaction with appellant.

Furthermore, whether or not the government be considered a "purchasing agent" for Phillips, it seems clear under the principle of ***McCulloch* v. *Maryland*,** 4 Wheat. 316, that Idaho could not validly send its tax bill to the United States and expect the government to look to Phillips for reimbursement. *A fortiori* it cannot achieve this purpose indirectly by requiring an out-of-State dealer to "collect" the tax from the United States. This conclusion is in no way inconsistent with the decisions holding that a State (a) may impose a tax upon private parties doing business with the government even though the economic burden of the tax ultimately falls on the government (*e.g.*, *Alabama* v. *King & Boozer*, 314 U.S. 1) or (b) may require an out-of-State vendor to collect for it a use tax imposed on the in-State consumer (*e.g.*, *Scripto* v. *Carson*,[3] 362 U.S. 207). In the first

[3] The appellees erroneously imply that the tax upheld in *Scripto* was not a use tax and that its legal incidence was on the out-of-State vendor rather than the in-State user. Thus, appellees state (Br. 16) that the Court in *Scripto* "did not specifically label [the tax] a use tax." This is quite incorrect. At 362 U.S. 208 this Court explicitly noted that "[b]oth the trial court and the Supreme Court of Florida held that appellant does have sufficient jurisdictional contacts in Florida and, therefore, must register as a dealer under the statute and collect and remit to the State the *use tax* imposed on its aforesaid sales" (emphasis added). Later the Court declared that "we [do not] believe that Florida's requirement *that appellant be its tax collector* on such orders from its residents changes the situation. * * * Moreover, we note that Florida reimburses appellant for its service in this regard" (*id.* at 212; emphasis added). Plainly, therefore, *Scripto* does not stand for the proposition that a State may impose a tax on an out-of-State transaction merely because the seller does other business within the taxing State,

class of cases, the private contractor must pay the tax because its legal incidence is upon *him;* here, in contrast, the incidence of the Idaho tax (viewed as a use tax) is plainly not on the appellant, whose role, if any, is solely that of a collector. The second line of cases is equally inapposite, for in none of them was the out-of-State vendor required to collect the use tax from a party, such as the United States, which is itself constitutionally exempt both from the tax and from any collection requirement.

Respectfully submitted,

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but only for the long-settled proposition that a State may impose a use tax on the consumption of property within the taxing State and may require the out-of-State vendor to collect that tax.

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